IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.

AETNA INSURANCE COMPANY,

Petitioner,

—against—

ROBERT C. JEFFCOTT,

Respondent.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court is officially reported in 40 F. Supp. 404; the opinion, findings of fact and conclusions of law are printed in the Record (R., pp. 1885-1909), and the opinion of the Circuit Court of Appeals filed July 15, 1942, not yet officially reported, is printed at pages 1932 to 1941 of the record.

Jurisdiction of This Court.

This is a suit in admiralty by respondent against petitioner for the recovery of the face amount of two policies of insurance on the Yacht "Dauntless", which was damaged in the hurricane of September 21, 1938. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Section 347.

The Facts.

The facts are stated in the petition and will not be repeated here.

POINT I.

There is no admiralty jurisdiction over the subject matter of this suit. The Circuit Court of Appeals in holding that admiralty had jurisdiction, has violated settled principles uniformly followed by this and all other federal courts since the adoption of the Federal Constitution.

The Circuit Court of Appeals disposed of the question of admiralty jurisdiction rather casually by treating it as a mere matter of nomenclature. The Court said (R., pp. 1933-4):

> "Both parties agree that admiralty jurisdiction over contracts exists when the subject matter of the contract is maritime. It is also agreed that the subject matter of marine insurance is maritime. *De Lovio* v. *Boit*, C. C. Mass., 7 Fed. Cas. 418, No. 3776; *New England Marine Ins. Co.* v. *Dunham*, 11 Wall. 1, 20 L. Ed. 90. Accepting these labels as counters for decision, the question then is whether this insurance policy is a policy of marine insurance."

And the Court then pointed out that since the policy here involved insured against marine risks, it was a policy of marine insurance and therefore a maritime contract over which admiralty had jurisdiction.

The opinion of the Circuit Court of Appeals is perhaps the first instance in which the matter of admiralty jurisdiction under Article III §2 of the Constitution has been decided on the basis of nomenclature, using "labels as counters". And one of the "labels" which the Court used was counterfeit, as will be seen from a brief glance at the decisions of this Court which have defined the limits of admiralty jurisdiction.

The test and the sole test of admiralty jurisdiction in a suit on a contract is whether the contract is maritime in nature, *i. e.*, whether it relates to the "navigation, business or commerce of the sea".

Peoples Ferry Company of Boston v. *Beers, et al.*, 20 How. 393, 401;
The Belfast, 7 Wall. 624, 637;
Insurance Co. v. *Dunham*, 11 Wall. 1, 26;
The Eclipse, 135 U. S. 599, 608;
North Pacific S. S. Co. v. *Hall Bros. Co.*, 249 U. S. 119, 125;
Thames Co. v. *The Francis McDonald*, 254 U. S. 242, 244;
De Lovio v. *Boit*, Fed. Cas. #3776.

In *The Francis McDonald, supra,* this Court said that a contract, to be maritime in nature, must be—

> "directly and immediately connected with navigation or commerce by water."

Obviously a contract can be directly and immediately connected with navigation and commerce by water only when it relates to a ship engaged in commerce or navigation, or to cargo or passengers transported by water. All Federal courts heretofore have uniformly so held.

The subject matter of the policies of insurance here in suit was a ship, but a ship which was not engaged in navigation or commerce. It was a ship which had been withdrawn from all commerce and navigation, and which was (and by the terms of the contract in suit was bound to remain) laid up and out of commission.

Prior to the decision herein, and with the exception of two cases in the Fifth Circuit, in one of which the point was not raised and both of which must be considered overruled by the later case of *Kibadeaux* v. *Standard Dredging Co.*, 81 Fed. (2nd) 670, cert. denied in 299 U. S. 549, no contract in regard to a ship which was withdrawn from navigation, laid up and out of commis-

sion, has ever been held to be a maritime contract or subject to admiralty jurisdiction. On the contrary, the federal courts have uniformly and consistently held that *all* contracts having to do with laid-up vessels are non-maritime, because in their very nature such contracts cannot be directly and immediately connected with navigation or commerce by water.

Thus a contract for storage of goods on a vessel which is withdrawn from navigation and laid up, is not a maritime contract, and admiralty has no jurisdiction over it.

> *Pillsbury Flour Mills Co.* v. *Interlake Steamship Co.*, 40 Fed. (2d) 439 (C. C. A. 2); cert. denied 282 U. S. 845;
> *The Richard Winslow*, 67 Fed. 259; aff. 71 Fed. 426 (C. C. A. 7).

In the *Pillsbury* case the Circuit Court of Appeals for the Second Circuit, relying very largely on the decision of the Circuit Court of Appeals for the Seventh Circuit in *The Richard Winslow*, held that the admiralty courts had no jurisdiction over the relations between ship and cargo during a winter layup which was preceded and followed by actual transportation. Counsel for the petitioners in the present case, who represented the libellant in the *Pillsbury* case, applied (unsuccessfully) to this Court for a writ of certiorari, believing that the decision imposed an improper limitation on the admiralty jurisdiction. If the rule laid down in that case is good law (as presumably it still is in the Seventh Circuit) it is certainly impossible to support the present decision where the contract in suit did not,—and under its terms could not,—have any relation whatever to transportation or navigation.

A contract for the furnishing of wharfage to a vessel which is withdrawn from navigation and laid up, is not maritime and admiralty has no jurisdiction over it.

> *The Murphy Tugs*, 28 Fed. 429;
> *The C. Vanderbilt*, 86 Fed. 785, aff'd 93 Fed. 986 (C. C. A. 2);

Beard v. *Marine Lighterage Corp.*, 296 Fed. 146;
The William Leishear, 21 F. (2d) 862;
The General Lincoln, 24 F. (2d) 441;
Hughes on Admiralty (2nd Edition), 22.

A contract by which persons are hired to safeguard and care for a ship which is withdrawn from navigation and laid up, is not maritime, and admiralty has no jurisdiction over it.

The Sirius, 65 Fed. 226;
The Fortuna, 206 Fed. 573;
The Erinagh, 7 Fed. 231;
Hughes on Admiralty (2nd Edition), 22.

A contract for the use of a vessel which has been withdrawn from navigation, is not maritime. Thus a contract for the use of a vessel as a floating hospital or quarantine station is not maritime. *City of Detroit* v. *Grummond*, 121 Fed. 963, 971 (C. C. A. 6). Nor is a contract under which a barge is chartered for use as an adjunct to a pier. *W. F. & R. Boatbuilders* v. *Hudson River Steamboat Co.*, 9 Fed. Supp. 932.

A contract for the furnishing of necessary supplies to a vessel not engaged in navigation or maritime work, is not a maritime contract.

In re Hydraulic Steam Dredge No. 1, 80 Fed. 545 (C. C. A. 7);
J. C. Penney-Gwinn Corporation v. *McArdle*, 27 F. (2d) 324 (C. C. A. 5); Cert. denied 278 U. S. 632;
Kibadeaux v. *Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5); Cert. denied 299 U. S. 549.

A contract for the building of a ship is not maritime and admiralty has no jurisdiction over it. The reason is that a ship, while in process of construction, is not engaged in commerce or navigation. In *Thames Company*

v. *The Francis McDonald*, 254 U. S. 242, 244, this Court stated that—

> "* * * contracts to construct entirely new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water."

How can a policy of insurance be considered as "directly and immediately connected with navigation or commerce by water", where the vessel it covers is withdrawn from navigation, laid up and out of commission, and where the policy warrants that this condition shall continue as long as the policy remains in force?

In its opinion herein the Circuit Court of Appeals brushes aside all of the cases above cited (including two of its own decisions) on the ground that the distinctions which those cases draw—

> "between ships engaged in active service and ships laid up * * * are generally unreal."

Whether the distinction is real or synthetic, it is one which all courts, up to the present decision, have followed without deviation, and which has its roots in the basic principle which this Court has laid down and consistently adhered to, namely, that no contract can be maritime in nature (and therefore the subject of admiralty jurisdiction), unless it is

> "directly and immediately connected with navigation and commerce by water."

That principle, so often affirmed and reaffirmed, and heretofore so rigidly adhered to, should not be jettisoned without the sanction of this Court.

Two further points should be mentioned.

1. The Circuit Court of Appeals, in its opinion herein, stated that any policy which insures against marine risks is a policy of marine insurance and that "the subject

matter of marine insurance is maritime". Arguing from these two premises, it reached the conclusion that all policies insuring against marine risks are maritime contracts.

This argument and the conclusion to which it leads are demonstrably unsound, both as a matter of principle and of authority. A marine insurance policy, of course, insures against perils of the sea; but every policy insuring against perils of the sea is not a maritime contract. Bridges, wharves, piers and other structures which this Court has held to be not the subject of admiralty jurisdiction, are constantly insured against "perils of the sea". A policy of insurance covering a wharf or a bridge is certainly a "marine insurance policy" if the test is the perils insured against; but no one could conceivably argue that such a policy was a "maritime contract", since its subject matter (a wharf or bridge) is not and in its nature can not be "directly and immediately connected with navigation or commerce by water", any more than could the floating dry-dock involved in *Cope* v. *Vallette Dry Dock Company*, 119 U. S. 625.

A policy of insurance on a ship is or is not a maritime contract, according to whether the ship is or is not engaged in commerce and navigation. The question of perils which the policy insures against is wholly beside the point. This was specifically held by the Circuit Court of Appeals for the Seventh Circuit in *North German Fire Insurance Company* v. *Adams*, 142 Fed. 439. There a navigating vessel was insured against *fire only*. The Court held that because the policy covered a vessel engaged in commerce and navigation it was a maritime contract, in spite of the fact that it insured only against fire. The Court said (p. 441):

> "The insurance contract is maritime when it has 'reference to maritime service' or transactions, and the subject matter of this policy is insurance, upon a vessel in such service, and is equally within the definition, whether the insurance covers one or all of the risks of the service."

The risks insured against, not being the *subject matter of the contract,* have nothing to do with whether or not the contract is maritime. The decision of the Circuit Court of Appeals for the Second Circuit in the present case is in direct conflict with the decision of the Seventh Circuit Court of Appeals in *North German Fire Insurance Company* v. *Adams.*

Many buildings on or near the seashore are insured against damage by the sea. It would scarcely be argued that the Admiralty courts had jurisdiction over such insurance, and yet this result necessarily flows from the decision of the present case.

2. The Circuit Court of Appeals in the opinion in the present case wholly misconstrued the decision of this Court in *Insurance Company* v. *Dunham,* 11 Wall. 1. In that case this Court was dealing with a policy of insurance covering a vessel *actually engaged in navigation and commerce.* This Court was careful to limit its decision to "the contract of marine insurance as set forth in the present case" and held that the contract was maritime in its nature because the subject matter was a vessel actually engaged in commerce and navigation. This is wholly clear from the opinion of the court when read in its entirety, as well as from specific statements on pages 26, 29 and 30 of the opinion.

The decision in the present case sweeps aside all tests of admiralty jurisdiction heretofore applied by this Court and by the lower federal courts throughout the country. It sets up in their place a new and heretofore unknown test which substitutes nomenclature for legal principle. If the entire basis of admiralty jurisdiction in matters of contract is to be changed, such change should be had only with the sanction of this Court.

POINT II.

The Circuit Court of Appeals misconceived the scope of the so-called "American Rule" in regard to constructive total loss. Its decision not merely extends the rule to a field which it has never heretofore embraced, but makes it an instrument of unjust enrichment.

In England, from the earliest times, a vessel or cargo owner could abandon to his underwriter and claim a constructive total loss only where the damage was so extensive that the cost of recovery and repair exceeded the repaired (or agreed) value. The English rule is now codified as §60 of the Marine Insurance Act, 1906. (The Act is printed as an appendix to Arnould on Marine Insurance and Average.) It is based on the principle of indemnity, and under it an assured cannot recover more than his actual loss.

In the United States the *quantum* of damage required for a constructive total loss was first mentioned in 1795 in a cargo case. In *Fuller* v. *McCall*, 1 Yeates (Pa.) 464, it was argued that if the damage to cargo exceeds 50% of the value, the assured might abandon and claim a constructive total loss. The argument was supported by a reference to the then existent French law in regard to cargo. (Le Guidon, C. 7, Art. 1.) In 1799 a New York Court laid down this rule as to cargo in *Gardner* v. *Smith*, 1 Johns. Cas. 141.

In 1814 this Court held that the 50% rule was applicable, in the case of cargo insurance, *where the cargo was damaged short of destination.* In *Marcardier* v. *Chesapeake Insurance Co.*, 8 Cranch 39, this Court said:

> "It seems now clear, that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained *at an intermediate port of necessity, short of the port of destination.* * * *" (Our italics.)

Ever since the decision in the *Marcardier* case it has been settled law in this country that the 50% rule applies only to those cases in which the damage occurs and abandonment is tendered *short of destination.* Where the insured cargo or any material part thereof arrives at destination, no abandonment having meanwhile been tendered, recovery for a constructive total loss is never allowed unless the cost of recovery and reconditioning exceeds the *entire* reconditioned or agreed value.

Forbes v. *Manufacturers Insurance Co.,* 1 Gray (Mass.) 371, 375;
Pierce v. *Columbian Insurance Co.,* 14 Allen (Mass.) 320, 322;
Merchants Mutual Ins. Co. v. *New Orleans Mut. Ins. Co.,* 24 La. Ann. 305, 307;
Seton v. *Delaware Insurance Co.,* 21 Fed. Cas. #12675;
Wallerstein v. *The Columbian Insurance Co.,* 44 N. Y. 204;
Parsons on Marine Insurance, Vol. II, p. 159.

The "American rule" in regard to the *quantum* of damage requisite for a constructive total loss under a policy on the *hull* of a vessel, grew out of and is identical with the rule in cases of *cargo* insurance. (*Ruckman* v. *Merchants' Louisville Ins. Co.,* 5 Duer 342, 362.) An examination of the authorities will disclose that in every case where the 50% rule has been applied, the vessel has been damaged and abandonment tendered while she was at sea or while in a distant port.

On the other hand, wherever the damage occurred when the vessel was in her home port or its equivalent, or the tender of abandonment was made after the vessel's arrival at that port, recovery for constructive total loss has been permitted only if the cost of recovery and repair exceeded the *entire* repaired or insured value.

A case precisely in point is *Pezant* v. *National Insurance Company,* 15 Wendell (N. Y.) 453, a decision which the

Circuit Court of Appeals in the present case refused to follow, although it is cited by *Phillips on Insurance* as stating the law and as being sound in principle. There a vesel was insured under a time policy on a valuation of $6,000. While enroute from St. Thomas to Charleston, S. C., she capsized in a hurricane. Her crew succeeded in bringing her to Charleston where the wardens concurred in an estimate that the repairs would amount to 5/6ths of her insured value. The owner sued his underwriter for a constructive total loss, but recovered only a partial loss. On appeal the Court recognized that a damage in excess of 50% would constitute a constructive total loss where the damage and the tender of abandonment occurred while the vessel was on a voyage or at a distant port; but held that there could be no tender of abandonment and no constructive total loss where the vessel had reached her "port of destination", unless the damage was such that the cost of recovery and repair would exceed her *entire* value when repaired. Judge Bronson, speaking for the Appellate Court said (p. 461):

> "The law was, I think, correctly expounded by the judge on the trial. He charged the jury, in substance, that the plaintiffs could not recover as for a total loss, unless the vessel was so damaged that the expense of her repairs would be equal to, or exceed her value, when repaired. There is no complaint that the partial loss, for which the plaintiffs have recovered, was not properly adjusted."

To the same effect is *Merchants Mutual Insurance Co.* v. *New Orleans Mutual Insurance Co.*, 24 La. Ann. 305, 307.

The only cases which have been cited as contrary to the doctrine laid down by the above authorities are two old Pennsylvania decisions referred to in the *Pezant* case and in the present decision. The case of *Ralston* v. *Union Insurance Co.*, 4 Binney (Pa.) 386 (1812), is merely dictum on the point, as the claim for a constructive total loss was actually rejected on the ground that the damage was less than 50%. The case of *Peters* v. *Phoenix Insurance Co.*, 3 Sergeant & Rawle (Pa.) 25 (1817), as pointed out

in the *Pezant* case, was also probably dictum. These cases, however, are clearly distinguishable on the ground that in both of them the vessel had actually been sold in a port of distress in a foreign country—Funchal, Madeira, in the *Peters* case, and Antwerp, Belgium, in the *Ralston* case. The authorities have always recognized that where a vessel has necessarily been sold in a foreign port she is an actual total loss and the question of abandonment does not arise. Thus in *American Insurance Company* v. *Ogden* (15 Wend. 532, 20 Id. 287) the Court said (p. 540):

> "* * * the right to abandon does not in all cases depend upon the amount of damages; but as was said in *Peale* v. *Ins. Co.*, the right exists in all cases where the ship is gone from the control of the insured; where the voyage is broken up; and, as in *Ins. Co.* v. *Southgate* where a sale of the ship has become necessary for the interest of all concerned."

On the same subject Phillips, the leading American text writer on the law of Marine Insurance, has this to say:

> "It has been held in divers cases, that, the ship having been sold justifiably as between the parties to the policy, on account of the perils insured against, the assured may recover for a total loss without an abandonment." Phillips on Insurance, 5th Edition, Volume 2, Section 1497.

Arnould, the leading English text writer states the rule as follows:

> "In many of the old cases, the question as to the right of the assured on ship, in respect of such casualties, to recover as for a total loss will be found to have arisen after the exercise by the master of the power which the law gave him in cases of extreme emergency to sell or otherwise dispose of the ship, for the benefit of all concerned. In such cases this question was very generally made to turn on the point whether the sale by the master was or was not justified by the urgent necessity of the case, it being considered that, wherever the circumstances were such as to justify the master in selling, there was a total

loss in respect of which the assured might recover from his underwriters."

Arnould on Marine Insurance and Average, 12th Ed., Vol. 2, Sec. 1113.

These authorities show that the courts have, very properly, attached great importance to a justifiable sale of the vessel in a port of distress.

We think the early background and origin of the 50% rule are nowhere better illustrated than in an opinion written by Mr. Alexander Hamilton for Mr. Archibald Gracie in 1800. We attach hereto as an appendix a copy of this opinion, the original of which is in the possession of petitioner's counsel. This opinion relates to the case of the Ship "Dauphin" which had been sold in a port of distress. We quote the following paragraph from the opinion:

"The expences and the salvage decreed amount to not a great deal less than half the whole value. I do not think it can be said that it was the duty of the assured to advance so large an additional sum of capital to enable the vessel to prosecute her voyage (admitting that her condition at the time presented no serious obstacle to its prosecution). If not the sale for payment of the salvage was a necessary consequence; which includes the loss of a voyage as she did not reach her destination—and as I think would form a case proper for abandonment and recovery as for a total loss. The cargo being nearly absorbed in payment of salvage expenses."

We call attention to the fact that it was the sale of the vessel and the frustration of the adventure rather than the percentage of loss which, in Mr. Hamilton's opinion, justified the claim for a total loss. At that time the courts had not adopted any rule of thumb such as the 50% rule; and the subsequent adoption of this percentage as the minimum which would justify the abandonment of the adventure, was certainly not intended to change the entire basis of the American law as to constructive total loss. The decision in the present case ignores the entire history and background of the 50% rule, which, as

originally applied, did not involve any fundamental departure from the English law with respect to constructive total loss.

If the *Pezant* case were an isolated early decision which had never been adopted or followed by any text writer of authority, the federal courts might have more justification for brushing it aside. Phillips, however, is easily the leading American authority on marine insurance and his work on the subject has been followed for generations by persons engaged in the marine insurance business. We attach hereto as an appendix a list of cases in which his work has been cited by this and other American courts and by the English courts, including the House of Lords.

Mr. Phillips, in Section 1555 of his Treatise on Insurance, after citing the *Pezant* case and discussing its basis both from the historical standpoint and that of legal principle, specifically disagrees with the decision in *Peters* v. *Phoenix Insurance Co., supra,* and states:

> "The better doctrine seems to be that *damage exceeding fifty per cent merely, independently of other considerations, does not constitute a constructive total loss, authorizing the making of an abandonment of the vessel after arrival at its home port of destination.*" (Italics are the authors.)

The Circuit Court of Appeals, in its decision, entirely failed to note the reasons underlying the distinction drawn by the authorities which have formulated the "American Rule", between the case of a vessel or cargo damaged and abandoned to underwriters while on a voyage or in a distant port, and the case of a ship or cargo which is damaged, and sought to be abandoned in her home port or its equivalent.

The lower courts took the view that there could be no constructive total loss in the case of the "Dauntless" unless the 50% rule applied. They overlooked completely the fact that where the cost of repairs exceeds the actual or agreed value the assured always has the right to abandon and claim a constructive total loss, even in the

port of destination. *Pezant* v. *National Insurance Co.*, 15 Wend. 453, 461; *Phillips on Insurance*, 5th Edit., §1532.

The 50% rule (unlike the English rule) violates, in many instances, the fundamental concept that insurance is a contract of indemnity, for it often permits recovery of an amount more than sufficient to make good the damage. However, when the 50% rule was adopted, over a hundred years ago, communication was slow and the possibility of sending help to a vessel in distress at a distant point was uncertain. There was accordingly some justification for a rule which transferred to the underwriters the difficulties and uncertainties flowing from a *substantial* damage to the insured *res where that res was far afield.* No such consideration was involved where the insured *res* was "at home" or "arrived home" before abandonment was tendered. Accordingly, where cargo reached its destination damaged, or where the damaged ship arrived at or was in its home port, or "in the possession of the owner", rather than on a voyage or in some distant port, the rule of *indemnity* was applied and the assured was permitted to recover only his *actual loss. If that loss were 100% of the repaired value, the owner's loss was in fact total and he could abandon,* as pointed out in the *Pezant* case and by Phillips. That has been the settled law since 1836 in New York, since 1854 in Massachusetts, and since 1872 in Louisiana. And it has been the law in the Federal Courts since the decision of Mr. Justice Washington in *Seton* v. *Delaware Insurance Company*, 21 Fed. Cas. No. 12675, in 1808. It is supported by all the textwriters who have considered the matter. Prior to the decision herein, no case will be found in which an owner, in a case like the present, has been permitted to recover more than his *actual loss.*

The injustice of the rule adopted below is especially aggravated in cases like the present, involving large ocean-going yachts. These vessels are ordinarily built or remodelled to suit the tastes of an individual owner. They have no ready market value at best, and in times of financial depression they have almost no commercial value. To allow such craft to be abandoned to underwriters

because of a damage slightly exceeding 50% is, indeed, a far cry from the original basis for the 50% rule, which was worked out in this country for the assistance of the early builders and operators of sailing vessels forced to seek ports of refuge in foreign countries.

That the right to abandon for a constructive total loss should be restricted rather than enlarged has been recognized in England from the earliest times. *Bainbridge* v. *Neilson*, 10 East 329, 343 (Lord Ellenborough, 1808); *Goss* v. *Withers*, 2 Burr. 683, 697 (Lord Mansfield, 1758); *Mitchell* v. *Edie*, 1 T. R. 608, 611 (1787).

And the same thing has been uniformly recognized in this country. Thus in *Seton & Delaware Insurance Company*, *supra*, Mr. Justice Washington, later a member of this Court, said (p. 1095):

> "The doctrine of abandonment has gone far enough, perhaps too far, when the nature of the contract of insurance is considered."

Similar statements are found in *Deblois* v. *Ocean Insurance Co.*, 16 Pick (Mass.) 303, 314; *Ruckman* v. *Merchants Louisville Ins. Co.*, 5 Duer (N. Y.) 342, 362; *American Insurance Co.* v. *Ogden*, 20 Wend. (N. Y.) 287, 306-7, 320; and in Couch on Insurance §1724.

In its opinion in the present case, the Circuit Court of Appeals holds flatly that "the American rule is the moiety rule", and that under the American Rule a vessel owner (in the absence of a policy provision to the contrary) can *always* abandon when the damage exceeds 50%. It calls the *Pezant* case "a strange phenomenon, not fitting into the general pattern of marine insurance law", and refers to the "peculiar result which would follow" if the rule of the *Pezant* case were applied here. This seems an extraordinary statement in view of the fact that the result of applying the *Pezant* case would only be that the assured would recover his actual damages instead of more than twice this amount. While the attitude of courts and juries towards insurance companies has not been par-

ticularly friendly, we think the point has not yet been reached in this country where it is generally considered "peculiar" for an assured to recover less than the face amount of his policy in the case of a partial loss.

The Circuit Court of Appeals wholly ignores the following facts:

(a) That in one of the earliest (and still one of the most authoritative) decisions on the matter, this Court, in *Marcardier* v. *Chesapeake Insurance Co., supra*, specifically limited the 50% rule to cases where the damage occurred "*short of the port of destination*"; and that Mr. Justice Washington, in *Seton* v. *Delaware Insurance Co., supra*, similarly limited it;

(b) That in the case of *cargo*, the 50% rule is *always* limited to cases where the damage occurs and abandonment is tendered prior to arrival at destination (see cases cited *supra* from Massachusetts, Louisiana and New York).

(c) That no court has ever before suggested that there was any distinction between hull and cargo, so far as concerns constructive total loss; and that accordingly the *Pezant* case is in no sense "peculiar"—it merely applies to hull the rule established by this Court in 1814 in the *Marcardier* case, and consistently followed in cargo cases from that day to this.

The decision in this case, by extending the 50% rule to a situation where it has never before been applied, makes the rule a basis for unjust enrichment, whereby an assured, under a contract which is supposed to indemnify him against loss, can recover twice the loss he has actually sustained.

POINT III.

The courts below, under the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and *Just* v. *Chambers*, 312 U. S. 383, were bound by and should have followed the State Court decision in *Pezant* v. *National Insurance Company*, 15 Wendell (N. Y.) 543, which holds that there can be no recovery for a constructive total loss unless the cost of recovery and repair exceeds the entire insured value, where the vessel is at her home port or its equivalent.

It does not appear from the record where the policies here involved were delivered and took effect. As, however, they were signed in Massachusetts (R. 102, 120) and the present suit is brought in New York, we take it that these are the only laws that could apply. As the Circuit Court of Appeals devoted most of its discussion to the New York law, which it declined to follow, it evidently assumed, we think correctly, that this is the law which would apply if it were bound to follow state law. In this brief we shall discuss the case on that basis.

The respondent, having elected to sue in the Federal Court in New York, that court, certainly in the absence of any allegation or proof that the contracts were governed by the law of some state other than New York, should have ascertained what the New York law was and having so ascertained, was bound, under the doctrine of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, to follow it. The courts below ascertained that the New York law was as set forth in *Pezant* v. *National Insurance Company*, 15 Wendell (N. Y.) 453, and having so found, proceeded to disapprove of that case and refuse to follow it. In the latter regard the courts below committed fundamental error.

1. Prior to the decision in *Erie Railroad* v. *Tompkins*, *supra*, the federal courts, in dealing with policies of

marine insurance, applied "federal law", regardless of whether the suit were at law or in admiralty. The reason was that in matters of general commercial law the federal courts, under the rule of *Swift* v. *Tyson*, decided what the law should be, regardless of state court decisions. In *Washburn and Moen Mfg. Co.* v. *Reliance Marine Insurance Co.*, 179 U. S. 1, this Court had before it a marine insurance policy covering cargo in process of importation, and in refusing to follow state law, said (p. 14):

> "It is said that a different rule has been laid down in Massachusetts by the Supreme Judicial Court of the Commonwealth. *Kettell* v. *Alliance Ins. Co.*, 10 Gray 144; *Mayo* v. *India Mut. Ins. Co.*, 152 Mass. 172. Even if this were absolutely so we should not feel constrained, though regretting the difference of opinion, to depart from our own rule. The policy was a Massachusetts contract, it is true, but its construction depended on questions of *general commercial law*, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the state decisions as in matters of purely local law." (Our italics.)

It was precisely this doctrine which was overruled in *Erie Railroad Company* v. *Tompkins*, where this Court said (p. 78):

> "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', *be they commercial law* or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." (Our italics.)

2. The fact that the present suit is in admiralty rather than at law does not render the rule of *Erie Railroad* v. *Tompkins* inapplicable. This Court there held that the substantive rights of litigants should not depend on the accidental circumstance that a particular case was removable (and was removed) from the state court to the federal court. Similarly the substantive rights of litigants cannot depend on the circumstance (accidental from the

standpoint of the petitioner) of whether the suit is brought on the law or the admiralty side of the court.

There is, of course, a field within which the general admiralty law is not merely supreme, but from which all state law, whether legislative or judicial, is excluded.

> *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205;
> *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160.
> *Cf. Parker* v. *Motor Boat Sales*, 314 U. S. 244.

Certain classes of maritime contracts, such as contracts for the hire of seamen, fall exclusively within the realm of the general admiralty law and are not subject to state law; and this is true whether the suit in which the contract is involved is at law or in admiralty, or in a state or federal court.

> *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205;
> *Union Fish Co.* v. *Erickson*, 248 U. S. 308.

Policies of marine insurance are not contracts of that kind. When a suit is brought in a state court on a policy of marine insurance, the state court is and always has been free to apply its own law thereto, regardless of what the law may be in the federal court and regardless of "the general admiralty law". For example:

(a) The rule in the federal courts has been that there can be no constructive total loss under a policy warranted "free of particular average"—only actual total loss is recoverable. *Washburn and Moen Mfg. Co.* v. *Reliance Marine Ins. Co.* (*supra*). A precisely contra rule prevails in New York. *Devitt* v. *Providence Washington Ins. Co.*, 173 N. Y. 17.

(b) The rule in the federal courts has been that in computing a constructive total loss under a marine hull policy, there can be no deduction of "one third old for new". *Bradlie* v. *Maryland Ins. Co.*, 12 Pet. 378; *Soelberg* v. *Western Assurance Co.*, 119 Fed. 23. A precisely contra

rule prevails in New York, Maine and Massachusetts. *Fiedler* v. *N. Y. Ins. Co.*, 13 N. Y. Sup. Ct. Rep. (6 Duer) 282; *Pezant* v. *National Ins. Co.*, 15 Wend. 453; *Dunning* v. *Merchants Mut. Ins. Co.*, 57 Me. 108; *Haebner* v. *Eagle Ins. Co.*, 10 Gray (Mass.) 131; *Reynolds* v. *Ocean Ins. Co.*, 22 Pick (Mass.) 191.

(c) The "high probability" rule as a test of constructive total loss under a marine policy has been adopted in the federal courts (*Orient Ins. Co.* v. *Adams*, 123 U. S. 67), whereas the "high probability" rule has been rejected in Massachusetts and Ohio. *Marmaud* v. *Melledge*, 123 Mass. 173; *Sewall* v. *U. S. Ins. Co.*, 11 Pick. (Mass.) 90; *Peabody Ins. Co.* v. *Memphis, etc. Packet Co.*, 5 Ohio Dec. 417.

If a marine insurance policy, like a contract for hire of a seaman, fell within the field covered by the doctrine of essential uniformity in admiralty, there could never have been this divergence between the state and federal courts. No court has ever suggested that a marine insurance contract is within the doctrine of *Southern Pacific Co.* v. *Jensen*.

3. The case of *Just et al.* v. *Chambers, Executrix*, 312 U. S. 383, is controlling here. There injuries were received by guests on a yacht in Florida waters. The owner of the yacht died and his executrix petitioned for limitation of liability in admiralty. Limitation was denied and the lower court imposed full *in personam* liability on the estate, under a Florida statute which provided for survival of tort liability. The Circuit Court of Appeals reversed on the ground that in admiralty, personal liability for torts did not survive. This Court reversed the Circuit Court of Appeals and held that the state statute was controlling. The Court held (pp. 389, 392) that state law is binding in admiralty, provided the state law—

> "'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony

> and uniformity in its international and interstate relations.' * * * Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved."

The "Friendship II" involved a state statute, whereas the case at bar involves state law established by judicial decision. That is an immaterial difference.

4. Even if marine insurance contracts fell within the rule of *Southern Pacific Co.* v. *Jensen*, and were within a field in which the general admiralty law is exclusive and supreme, the present case would fall within the exception laid down by this Court in such cases as *Great Lakes Company* v. *Kierejewski*, 261 U. S. 479; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; and *Millers' Underwriters* v. *Braud*, 270 U. S. 59. Those cases hold that in matters of purely local concern, state law controls, even in a field in which, if the matter were one of general concern, the general admiralty law would be supreme.

The present case is obviously one of purely local concern. The "Dauntless" was not engaged in commerce or navigation. She was laid up and out of commission, and so warranted for the policy duration. Under such circumstances, to hold that the policy should be construed according to state law, obviously could work no

> "prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations."

Conclusion.

Because the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court and of the Circuit Court of Appeals in the Fifth and Seventh Circuits; because the decision repudiates the rule heretofore uniformly followed in determining the existence or

non-existence of admiralty jurisdiction in matters of contract; because it greatly extends the scope of the exceptional doctrine of constructive total loss, which the courts have repeatedly said should not be extended; and because, in total disregard of the doctrine enunciated in *Erie Railroad* v. *Tompkins* and *Just* v. *Chambers*, it disapproves and refuses to apply applicable and controlling state law in the field of marine insurance, we respectfully submit that a writ of certiorari should be granted in order that the questions herein may be definitely and finally decided.

Respectfully submitted,

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